S.B. CIVIL WRIT PETITION NO.6618/2007

Moti Lal Dangi.
vs.
Madhusudan Janwar and anr.

Date : 6.12.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.RK Thanvi a/w Mr.N Thanvi, for the petitioner.
Mr.MS Singhvi a/w Mr.R Dave, for the respondents.

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Heard learned counsel for the parties.

The petitioner/defendant is aggrieved against the order of the trial court dated 30.8.2007 by which the petitioner's application for amendment of the written statement was rejected.

According to learned counsel for the petitioner, the facts have already been pleaded by the parties and the petitioner wanted to take a legal plea that the claim of the plaintiff of Rs.23 lakhs because of default in payment of Rs.19 lakhs is nothing but a contract having penal character and, therefore, cannot be enforced. In view of the fact that above is a legal plea, therefore, the trial court should have allowed the

application but the application has been dismissed by the trial court on the ground that the trial has commenced.

Learned counsel for the respondent submitted that the amendment application could not have been allowed in view of the amended provisions of Order 6 Rule 17 CPC which provides that when a plea could have been taken by the petitioner initially and has not been taken, then that cannot be allowed unless a cause is shown for not taking the plea originally. Learned counsel for the respondent relied upon the judgment of the Hon'ble Apex Court delivered in the case of Ajendraprasadji N.Pande & Anr. vs. Swami Keshavprakeshdasji N. Ors. reported in AIR 2007 SC 806 wherein the Hon'ble Apex Court held that the trial commences when the issues are settled and the case is set down for recording of evidence and further held that the defendant has to prove that inspite of due diligence, he could not take the plea before the commencement of trial. In view of the above, learned counsel for the respondent submits that the trial court was justified in rejecting the petitioner's application.

I considered the submissions of learned

counsel for the parties and perused the impugned order.

It is true that the trial commences from the stage of framing of issues as laid down by the Hon'ble Apex Court and at the same time, Proviso to Order 6 Rule 17 CPC gives power to the Courts to allow amendment but on condition of showing due diligence of the party seeking amendment, than it is not a case where the Court lacks power to allow the amendment at all.

Learned counsel for the respondent also submitted that the plea taken by the petitioner is inconsistent. This question will not remain more because of the fact that in certain facts and circumstances, there may be inconsistent and alternate plea also but that depends upon the facts of each case. I do not find any reason to reject this application on this ground.

In this case, the plea is a legal plea and could have been taken by learned counsel for the petitioner who might have drafted the written statement and the Court should be liberal in allowing legal defence in written statement. Therefore, in view of the above reason, it is

difficult to blame the petitioner alone for not taking legal defence in original written statement. Therefore, taking a liberal view, the writ petition is allowed, the order of the trial court dated 30.8.2007 is set aside and the amendment application is allowed but on payment of costs of Rs.1,000/- to the respondent.

Learned counsel for the respondent prayed that the trial court may be directed to decide the suit expeditiously.

In the facts of the case, the trial court is directed to decide the suit expeditiously.

(PRAKASH TATIA), J.

S.Phophaliya